

**KIRKLEES METROPOLITAN COUNCIL  
INVESTMENT & REGENERATION SERVICE**

**DEVELOPMENT MANAGEMENT**

**Town and Country Planning Act 1990 (as amended) Section 106A &  
106BA**

**DELEGATED DECISION FOR APPLICATION FOR DISCHARGE OR  
MODIFICATION OF SECTION 106 AGREEMENT**

Reference no. : 2022/54/91822/W

Site : Land at Edgerton Road, Huddersfield, HD3 3AA

Description : Modify Section 106 obligation relating to previous permission 2014/93014 for outline application for residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

Case Officer : Nick Hirst

**Decision Reference : Modification of S106 Obligation- Refused**

**I hereby authorise the refusal of this application for the reasons set out in the officer's report and recommendation annexed below in respect of the above matter.**

David Wordsworth

**AUTHORISED OFFICER**

**Date 12-Jun-2023**

**Application:** 2022/91822

**Location:** Land at Edgerton Road, Huddersfield, HD3 3AA

**Description:** Modify Section 106 obligation relating to previous permission 2014/93014 for outline application for residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

## **SITE AND SURROUNDINGS**

The application relates to a large open site of approximately 3 hectares. It partly fronts Edgerton Road to the south. The western boundary abuts a public footpath alongside the large grounds of 18-20 Edgerton Road (HUD/345/20). The northern boundary is marked by Clayton Dyke with woodland along its banks and Council owned allotments to the north. This boundary does not follow the current channel of the Dyke but meanders across it. The south eastern and east boundaries of the site abut dwellings off Queens Road and Deveron Grove. The site slopes down from north to south.

The site lies within the Edgerton Conservation Area and there are Listed Buildings close to the site. Public footpath HUD/345/20 runs alongside the western boundary, but the site boundary does not include its route.

The site contains sporadic woodland and individual trees, most notably along the Dyke, which are protected by specific preservation orders as well as by virtue of their location in the conservation area. Within the conservation area trees above a minimum size are protected. Historic tree preservation orders (TPOs) were required to be reviewed under legislation and a new Order was served in January 2015. This consolidates those historic TPOs, some of which were unconfirmed and reflects the current coverage of significant individual trees and woodland on site.

## **THE PROPOSAL**

The application has been submitted under Section 106A of the Town and Country Planning Act 1990 and Town and Country Planning (Modification and Discharge of Planning Obligation) Regulations 1992. It is seeking permission to *'modify Section 106 obligation relating to previous permission 2014/93014 for outline application for residential development comprising of 41 dwellings plus associated works (within a Conservation Area)'*

The application seeks to remove the financial obligations from the Unilateral Undertaking (dated 16/06/2015) which was secured under outline planning permission 2014/93014 following appeal APP/Z4718/W/15/3002523 being allowed.

- **Education:** £89,547.00
- **Affordable Housing:** £248,255.25
- **Metro Card:** £19,505.75

- **Bus Priority:** £5,000.00
- **Total:** £362,308.00

The following documents have been submitted in support of this application:

- Application Form
- Supporting Statement
- Accounts Financial Information
- Extant Unilateral Undertaking (2014/93014)
- Previous Viability Assessment (2014/93014)

## **RELEVANT PLANNING HISTORY**

*Application:* 2017/92670

*Description:* Variation conditions 1 (plans) and 2 (siting) on previous permission 2017/90190 for reserved matters application pursuant to outline permission 2014/93014 for erection of residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

*Decision:* Refused 12/10/2017

*Application:* 2017/91916

*Description:* Variation of condition 23 (highway works) on previous permission 2014/93014 (APP/Z4718/W/15/3002523) for outline application for residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

*Decision:* Approved 01/09/2017

*Application:* 2017/90190

*Description:* Reserved matters application pursuant to outline permission 2014/93014 for erection of residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

*Decision:* Approved 21/04/2021

*Application:* 2014/93014

*Description:* Outline application for residential development comprising of 41 dwellings plus associated works (within a Conservation Area)

*Decision:* Appeal Allowed (APP/Z4718/W/15/3002523) 11/09/2015

*Application:* 1997/90270

*Description:* Outline application for erection of 48 dwellings (within Conservation Area)

*Decision:* Refused 13/03/2003

A number of Non-Material Amendments and Discharge of Conditions have also been considered and determined in relation to this site and the abovementioned planning applications.

## **HISTORY OF NEGOTIATIONS**

Officers negotiated with the applicant to:

- Submit all of the necessary information to assess the viability implications of the proposal for independent review.

## **PLANNING LEGISLATION AND POLICY**

Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning applications are determined in accordance with the Development Plan unless material considerations indicate otherwise. The statutory Development Plan for Kirklees is the Kirklees Local Plan. The Kirklees Local Plan was adopted on 27 February 2019 and comprises the strategy and policies document, allocations and designations document and associated proposals map.

The following legislation, policies, and guidance are considered relevant to the determination of this application:

### Kirklees Local Plan (February 2019)

- **LP4:** Providing infrastructure
- **LP11:** Housing Mix and Affordable Housing
- **LP20:** Sustainable travel
- **LP49:** Educational and health care needs
- **LP63:** New Open Space

### Supplementary Planning Documents and Other Guidance

- Viability Guidance Note (June 2020)
- Open Space SPD (June 2021)
- Affordable Housing and Housing Mix SPD (March 2023)

### National Planning Policy Framework (NPPF) (July 2019)

- Chapter 2 – Achieving sustainable development
- Chapter 4 – Decision-making
- Chapter 5 – Delivering a sufficient supply of homes
- Chapter 8 – Promoting healthy and safe communities
- Chapter 9 – Promoting sustainable transport

### National Planning Practice Guidance

- Viability (September 2019)

## **REPRESENTATIONS (PUBLIC)**

This application has been advertised as an application to modify or discharge a planning obligation.

Publication of the application has been undertaken in accordance with the Council's Development Management Charter (July 2015) and in line with the Council's adopted Statement of Community Involvement (December 2019).

The statutory public consultation period took place between 15/06/2022 to 06/07/2022.

During the public consultation, a total of 39 representations were made. Of these, 0 were made in support, 37 were received as objections, and 2 as general comments.

The key points raised in OBJECTION are as follows:

- Section 106 contributions were originally required to make the development acceptable in planning terms.
- Removal of contributions on this scale should require a new planning application.
- Finances of a development should be at the risk of the developer, not the Council.
- No consideration of the recent increases in land and property values have been put forward by the applicant.
- Applicants have provided little evidence of claimed expenditure.
- Claimed expenditure (particularly monthly site maintenance costs) is anecdotally contested.
- Social housing should be provided as agreed.
- Costs have been inflated by several submissions of condition discharge applications for the same conditions due to the poor state of information provided.
- Residents should not be subsidising developers' profits by losing out on social, environmental, and physical infrastructure improvements secured under a Section 106 Agreement.
- Section 106 obligations should be increased in line with inflation.
- Any modification proposals should demonstrate compliance with the adopted Kirklees Local Plan as this supersedes the previous Development Plan under which the original planning permission was determined.
- Kirklees Council can demonstrate a five-year housing land supply so there is no reason why a policy compliant scheme should not be delivered.
- Proposed modifications would have a detrimental impact on the residential amenities of local residents and impact negatively on highways safety and increased pollution.

The key points raised as COMMENT are as follows:

- Some other comments were received in relation to the principle of residential development on this site and other matters, such as layout. However, given the scope of this Section 106A planning obligations

modification application, these comments are not considered to be material to this proposal.

Local ward members were notified of the proposal. No comments were received. Local MP Barry Sheerman provided representation on the proposal, which is summarised as an objection to the removal of the S106 obligations.

## **CONSULTATION RESPONSES**

Invitations to comment on this application were sent to the following consultees:

### Kirklees Council

KC Education: No comments received.

KC Strategic Housing: Advice received.

### **External Consultees:**

Huddersfield Civic Society: Objects to the proposal (objection received as public representation).

West Yorkshire Combined Authority (Metro): No comments received.

## **MAIN ISSUES**

Taking into consideration the site allocations and constraints, the main issues for consideration as part of the appraisal of the application are:

- Planning Obligations
- Viability Assessment

## **OFFICER ASSESSMENT**

This application is not an application for planning permission. It is an application to modify a legal agreement made under Section 106 of the Town and Country Planning Act (as amended).

Section 106A of The Act allows for the modification and discharge of planning obligations. Section 6 allows for this in one of three ways:

- a) *that the planning obligation shall continue to have effect without modification;*
- a) *if the obligation no longer serves a useful purpose, that it shall be discharged; or*
- b) *if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.*

NPPF (Chapter 4) Paragraph 57 states that:

*Planning obligations must only be sought where they meet all of the following tests:*

- a) necessary to make the development acceptable in planning terms;*
- a) directly related to the development; and*
- b) fairly and reasonably related in scale and kind to the development.*

NPPF (Chapter 4) Paragraph 58 states that:

*Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.*

## **Planning Obligations**

### Extant Unilateral Undertaking

A Unilateral Undertaking (dated 16/06/2015) was entered into by the applicant following appeal APP/Z4718/W/15/3002523 being allowed pursuant to planning application 2014/93014. This secured the following planning obligations which were considered to be materially relevant to make the proposal acceptable in the planning balance:

- **Education:** £89,547.00
- **Affordable Housing:** £248,255.25
- **Metro Card:** £19,505.75
- **Bus Priority:** £5,000.00
- **Total:** £362,308.00

The above listed obligations were a reduction of the policy expectations at the time, reduced following a viability review process that included a Viability Assessment (dated 04/06/2015) by a Council appointed independent assessor. The assessment concluded that:

*Having carried out an independent assessment using the information provided by the Applicant and in taking our own independent view where appropriate in respect of cost allowances and values as set out herein, we are of the opinion that the scheme to construct 41 units on the site can support s106 contributions of £362,308. We would therefore*

*recommend that this is now adopted as part of any Planning Permission to be granted.*

## **Viability Assessment**

### Viability Assessment for Unilateral Undertaking Modifications

The applicant has submitted some additional financial information pursuant to the abovementioned 2015 Viability Assessment. This details that due to increases in what they consider to be over and above normal expected costs of development a site (increased loan interest costs, ongoing annual management costs, and incurred consultant and legal fees for the development), caused by delays in the original approval being implemented, would mean that the development would no longer be viable with the inclusion of the planning obligations secured under the 2015 Unilateral Undertaking. Together, these unforeseen costs are stated by the applicant to amount to £420,467.15, in excess of the original combined total of the planning contributions of £362,308.00.

The applicant's viability case has been assessed by the Council's IVA who were procured via an external commissioning process, in line with the Council's financial regulations. Confidential account transactions were made available by the applicant to support their justification for the proposal.

The IVA considered that the information submitted by the applicant is not of sufficient scope or detail to be able to conduct a financial viability appraisal. The IVA considered that the reliance on 2015 viability data is not appropriate to calculate the effects of any ongoing or unforeseen costs on the scheme's viability in the current financial climate. This is in line with the Council's Viability Guidance Note (2020) which states that development costs should be based on current day figures. No updated viability report has been submitted by the applicant in this regard. The IVA also notes that "*the applicant has provided a brief breakdown of costs incurred due to not developing the land in recent years, although this again cannot be used to assess viability*".

Officers note the up-to-date position of the Kirklees Local Plan (adopted in 2019, after the decision on the original planning permission) and the Council's ability to demonstrate a 5-year Housing Land Supply. As such, it is considered that the planning obligations secured under the extant planning permission and associated Unilateral Undertaking would still be required to make the development acceptable in planning terms. Consultee comments received from KC Strategic Housing demonstrate the ongoing need for the provision of affordable housing arising from the development.

Paragraph 58 of the NPPF states:

*Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the*

*application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.*

Given the above consideration and the expectations set out within paragraph 58 of the NPPF, Officers are unable to attribute any weight to the submitted viability information as no satisfactory evidence has been put forward to sufficiently support the removal of the abovementioned Section 106 contributions.

As such, the proposal is considered to be contrary to Policies LP4, LP11, LP20, LP49, and LP63 of the adopted Kirklees Local Plan. Furthermore, the extant Section 106 contributions are also considered to be in accordance with the three tests for planning obligations established by paragraph 57 of the NPPF.

Returning to Section 106A of The Act, s6 allows for a S106 agreement to be discharged / modified in one of three ways:

- a) that the planning obligation shall continue to have effect without modification;*
- a) if the obligation no longer serves a useful purpose, that it shall be discharged; or*
- b) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.*

Officers conclude that the original S106 continues to serve a useful planning purpose, being in accordance with up-to-date policies, and insufficient evidence has been provided to demonstrate a viability-based reason to justify a departure from said policies.

## **Representations**

The following are responses to the material representations received which are not addressed within the report:

- Removal of contributions on this scale should require a new planning application.

**Response:** The S106a process does allow for the removal of planning obligations, if justified.

- No consideration of the recent increases in land and property values have been put forward by the applicant.

- Applicants have provided little evidence of claimed expenditure.
- Claimed expenditure (particularly monthly site maintenance costs) is anecdotally contested.
- Costs have been inflated by several submissions of condition discharge applications for the same conditions due to the poor state of information provided.

**Response:** The above comments are noted, and align with officer's conclusion that the submission provides inadequate detail.

### **Summary and Recommendation**

The proposed planning obligation modifications are considered not to be acceptable based on the conclusions of the Council's Independent Viability Assessor and given the insufficient levels of detail within the applicant's submitted financial viability information.

The Section 106 obligations are also considered to continue to serve a useful purpose. As such, the proposal is considered not to be in accordance with Policies LP4, LP11, LP20, and LP49 of the adopted Kirklees Local Plan. Therefore, Officers recommend determination of this application in accordance with subsection 6(a) of Section 106A of the Town and Country Planning Act 1990 (as amended), such that the planning obligation shall continue to have effect without modification.

**Recommendation:** the planning obligation shall continue to have effect without modification

**Report Dated:** 06.06.2023